Supreme Court, U.S.
FILED

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IN THE

Supreme Court of the United States

October Term, 1994

KENNETH GOERING, ANN M. BOWEN,
LISA K. STRIMPLE-PADIOS and EMILIE J. VOLQUARTSEN,
Petitioners,

v.

STATE OF NEBRASKA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEBRASKA

PETITION FOR WRIT OF CERTIORARI

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63 pp

QUESTIONS PRESENTED

1. WHETHER DEFENDANTS WHO ARE CHARGED WITH MULTIPLE OFFENSES ARISING OUT OF ONE INCIDENT WHICH, CUMULATIVELY, EXPOSE DEFENDANTS TO MORE THAN SIX MONTHS IMPRISONMENT, MAY BE DENIED THE CONSTITUTIONALLY PROTECTED RIGHT TO A JURY TRIAL.

2. WHETHER AN OFFENSE MUST BE DEFINED AS A "SERIOUS" OFFENSE WITHIN THE GUIDELINES ESTABLISHED BY THIS COURT, WHEN IMPOSITION OF A PRISON SENTENCE OF LESS THAN SIX MONTHS WOULD NECESSARILY INFLICT A FURTHER PENALTY JPON A DEFENDANT IN THE EXERCISE OF DEFENDANT'S FUNDAMENTAL CONSTITUTIONAL RIGHTS.

LIST OF PARTIES

The parties to the Douglas County Court, the District Court for Douglas County, Nebraska and the Court of Appeals of the State of Nebraska were Kenneth Goering, Ann M. Bowen, Lisa K. Strimple-Padios and Emilie J. Volquartsen, and the State of Nebraska.

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No. ____

IN THE

Supreme Court of the United States

October Term, 1994

KENNETH GOERING, ANN M. BOWEN,
LISA K. STRIMPLE-PADIOS and EMILIE J. VOLQUARTSEN,
Petitioners,

v.

STATE OF NEBRASKA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEBRASKA

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of Nebraska in this case.

OPINIONS BELOW

The dispositions of the cases against each Petitioner in the Douglas County Court, dated March 2, 1992, appear at Appendix A. The disposition sheets do not accurately reflect the guilty verdicts for Petitioner Goering or Bowen, and an excerpt from the transcribed transcript of proceedings therefore also appears at Appendix A. This excerpt of Judge Cropper's decision states the findings of guilty on each charge for each Petitioner. The District Court of Douglas County, Nebraska's Opinions and Orders of November 17, 1993, appear at Appendix B below.

The Opinion of the Court of Appeals of the State of Nebraska, dated October 25, 1994, appears at Appendix C below. The Order of the Nebraska Supreme Court, denying Petitioners' petition for review, entered December 29, 1994, appears at Appendix D below.

JURISDICTION

This case seeks review of a decision of the Court of Appeals of the State of Nebraska entered on October 25, 1994.

Jurisdiction for review of this matter by certiorari is conferred on this Court by 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . .

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . .

United States Constitution, Amendment XIV

[N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Nebraska Constitution, Article I, § 6

The right of trial by jury shall remain inviolate.

Nebraska Constitution, Article I, § 11

In all criminal prosecutions the accused shall have the right to . . . a speedy trial by an impartial jury.

STATEMENT OF THE CASE

This case involves charges arising out of a peaceful demonstration outside a Nebraska abortion clinic held on December 14, 1991. Criminal charges were filed against each of the Petitioners for trespass, request to leave, and obstructing administration of law. Each of these charges carried maximum penalties of six months imprisonment, a $500 fine, or both.

Petitioners' request for a jury trial, based on the federal and state constitutions, was denied. On March 2, 1992, Petitioners were each found guilty in the Douglas County Court of all three charges. Appeal was properly made to the District Court of Douglas County. The Statement of Errors filed with the appeal included, *inter alia*, the denial of a jury trial to Petitioners.

On November 17, 1993, the District Court reversed the trespass convictions, but affirmed Petitioners' convictions for request to leave and obstructing administration of law. Appeal was properly made to the Nebraska Court of Appeals, which affirmed the District Court's decision, by a 2-1 majority, on October 25, 1994. A Petition for Review was denied by the Nebraska Supreme Court on December 29, 1994, without opinion being rendered.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari in order to resolve a conflict that has arisen within the circuits, and is being perpetuated by the decision of the Court of Appeals for the State of Nebraska. The conflict involves the right of a defendant to demand a jury trial when the cumulative penalty for all offenses charged arising out of one incident exceeds six months in jail or $500, or both. At least three different tests are being applied by courts of appeal and district courts in making a determination of the extent of the constitutional right to a jury trial, and Petitioners respectfully request that this Court grant certiorari in the instant

case in order to resolve the conflict and avoid confusion and uncertainty in the law.

This Court should also grant certiorari in order to resolve an issue of public importance, in that the practice of charging protestors with multiple "petty" offenses and subsequently denying those protestors the right to a jury trial is undermining the constitutional protections historically afforded even unpopular speech under the First Amendment to the Constitution of the United States and under the Nebraska Constitution. Petitioners respectfully request this Court to grant certiorari in order to clarify for all circuits and all States the importance of upholding the fundamental constitutional rights of all citizens, even when current public social policy disapproves of certain forms of protected speech.

These reasons for granting certiorari are further expanded hereafter in this Petition.

I. WHERE DEFENDANTS ARE CHARGED WITH MULTIPLE OFFENSES ARISING OUT OF ONE INCIDENT WHICH, CUMULATIVELY, EXPOSE DEFENDANTS TO MORE THAN SIX MONTHS IMPRISONMENT, THE CONSTITUTIONAL RIGHT TO A JURY TRIAL MAY NOT BE DENIED.

Under Amendment VI and Amendment XIV of the United States Constitution, and Article I, §§ 6 and 11 of the Nebraska Constitution, criminal defendants are constitutionally entitled to have their cases tried by a jury. Nevertheless, in laying down rules for the efficient administration of justice, this Court and courts in all States have developed principles whereby certain criminal offenses, deemed to be "petty" offenses, do not entitle defendants to jury trials. In defining the level at which an offense could no longer be considered "petty," this Court held, in *Baldwin v. New York*, 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970), that "no offense is petty for which imprisonment for more than six months is authorized." (*Id.* at 69.)

In *Blanton v. City of North Las Vegas*, 489 U.S. 538, 109 S.Ct. 1289, 103 L.Ed.2d 550 (1989), this Court held that an offense which carried a maximum penalty of six months imprisonment was to be deemed a "petty" offence and did not afford a defendant the right to a jury trial, absent some additional factor which would elevate the offense to "serious." It must be noted, however, that in *Blanton* this Court discussed the question of the right to a jury trial in the context of a potential exposure to imprisonment of no more than six months, regardless of whether the crime was deemed "petty" or "serious."

Petitioners respectfully submit that *Blanton*, cited by the Nebraska Court of Appeals in rendering its decision, does not stand for the proposition that defendants charged with multiple offenses arising out of one incident, offenses which expose the defendants to a potential term of imprisonment of up to 18 months, are to be denied the right to a jury trial. Petitioners believe that such a mistaken reading of this Court's decisions led to the decision of the Nebraska Court of Appeals in the instant case, and is leading to a split in the circuits in upholding the constitutional right of defendants to a jury trial.

In *U.S. v. Potvin*, 481 F.2d 380 (10th Cir. 1973), the appeals court stated:

> We believe that the defendants can view as no less serious a possible penalty of a year in prison when charged with two offenses arising out of the same act, transaction, or occurrence, than if charged with one offense having a potential penalty of one year's imprisonment. Nor, in our view, should the court view the offenses any less seriously.

Id. at 382.

The Nebraska Court of Appeals in the instant case appears to have followed a line of cases which holds that the right to a jury trial is to be determined *post* trial, when one considers the

actual sentence imposed, i.e. if no more than six months in prison is imposed by the judge, the defendant had no right to a jury trial. (*See U.S. v. Kozel*, 908 F.2d 205 (7th Cir. 1990), *cert. denied* 489 U.S. 1089, 111 S.Ct. 969, 112 L.Ed.2d 1053 (1991); *Bruce v. State*, 126 Ariz. 271, 614 P.2d 813 (1980).)

Petitioners respectfully submit that this is a classic case of putting the cart before the horse. It is a well known axiom that justice must not only be done, but must be *seen* to be done. If a constitutional right to a jury trial is to be given a defendant, then that right attaches at the time of the trial, not at the time of sentencing or appeal.

Petitioners submit that the proper test for granting a defendant a jury trial is the aggregate sentence to which that defendant is exposed as a result of the trial. In *U.S. v. Coppins*, 953 F.2d 86 (4th Cir. 1991), the Court of Appeals held that the defendant was entitled to a jury trial because a conviction on all three charges arising out of the same incident would expose her to a potential prison sentence of 15 months. Judge Phillips stated in his opinion that:

> [T]he district court erred in holding that a defendant's constitutional right to jury trial can in effect be trumped by the imposition of a sentence which, because of its binding effect on retrial, thereby effectively becomes the determinant of the original right. What is being asserted on appeal is the right not to be convicted in the first place except by a jury. An arguably unconstitutionally obtained conviction cannot be immunized from challenge by finding the challenge mooted by the sentence imposed.

Id. at 88.

Similarly, in *State v. Sanchez*, 109 N.M. 428, 786 P.2d 42 (1990), the court held that the issue of whether a jury trial is required in any particular case should be objectively measured

by looking at the maximum statutory penalties to which the defendants are exposed, rather than subjectively measured by the penalty threatened at the time of the trial.

In *Haar v. Hanrahan*, 708 F.2d 1547 (10th Cir. 1983), the Court of Appeals held that:

> [B]ecause modern criminal codes permit multiple charges to flow from a single discrete act of criminality, a criminal prosecution can threaten a defendant with the consequences of a serious offense, even though the defendant is not charged with an offense deemed serious under *Duncan [v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968)] or *Baldwin*. Thus, strictly applying the serious offense definition may not protect the defendant from an oppressive prosecution. *Potvin* addresses this problem by identifying the "act, transaction or occurrence" that underlies the criminal charges. In determining the right to a jury trial, it looks to the aggregate penalty that could result from the various charges arising out of a discrete criminal transaction.

Haar at 1551. Petitioners believe that such a common-sense approach is the appropriate standard for determining the right of a defendant to a jury trial.

The Fourth Circuit Court of Appeals, in *U.S. v. Jenkins*, 780 F.2d 472 (4th Cir. 1986), applied this Court's rules in *Baldwin*, holding that a determination of the classification of a crime as "serious" or "petty" includes a consideration of "1) the intrinsic nature of the offense itself, and 2) the maximum *potential* penalty." (*Jenkins*, at 474 (emphasis added).)

In *U.S. v. Musgrave*, 695 F.Supp. 231 (W.D. Va. 1988), the district court upheld defendants' right to a jury trial, "believing that the potential aggravated sentences the defendants could receive placed these particular crimes into the category of 'seri-

ous offenses,' thus implicating the defendants' right to a jury trial." (*Id.* at 231.) Both in this case, and in the case of *U.S. v. Coleman*, 664 F.Supp. 548 (D.D.C. 1985), where the court also upheld the right to a jury trial, the opinions commented on the fact that this Court has not clarified the issue of aggregation of penalties in the determination of the right to a jury trial. Petitioners believe that such a clarification would greatly benefit the proper administration of justice throughout the circuits.

The Supreme Court of New Mexico, in *Vallejos v. Barnhart*, 102 N.M. 438, 697 P.2d 121 (1985), was faced with interpreting statutory provisions relating to sentencing limits and the right to a jury trial. The Court discussed legislative intent as well as statutory construction, and held:

> [W]here the language of the legislative act is doubtful or an adherence to the literal use of words would lead to injustice, absurdity or contradiction, the statute will be construed according to its obvious spirit or reason, even though this requires the rejection of words or the substitution of others.

Id. at 123. The New Mexico Supreme Court held that the proper interpretation of the sentencing statute demanded that the term "penalty" refer to the aggregate penalty to which the defendant was exposed, rather than each, individual, penalty.

Petitioners respectfully submit that to use any measure but an objective one, as outlined above, would be to open up our legal system to abuse. Petitioners in the instant case were charged in connection with an incident involving an issue of great public controversy, i.e. pro-life demonstrations. The current social and political environment views such demonstrators in an extremely negative fashion, so much so that there have been strenuous efforts to curtail pro-life demonstrators' constitutional right to free speech. That many of these efforts can be traced to a knee-jerk reaction to the few violent pro-life protestors among the many thousands of non-violent demonstrators

does not lessen the impact on all citizens who wish to publicly express their support of *any* cause, not just the pro-life cause.

One tool that can be used to circumvent the constitutional rights of persons charged in connection with demonstrations is to charge them with multiple, "petty" offenses none of which, individually, may entitle the defendant to a jury trial. Thus, taken to its logical conclusion, it is entirely conceivable that those citizens taking a stand on any issue that, by the political standards of the day, is a highly controversial one, could find themselves in the unenviable situation of having a string of convictions on their records for multiple offenses, never having had the opportunity to have their cases tried by jury.

Proper, speedy, and efficient administration of justice does not demand that each and every defendant in a criminal case be entitled to a jury trial. It does, however, demand that those defendants who are potentially subject to extensive criminal records, lengthy prison sentences and/or considerable fines, be entitled to have their cases heard by a jury of their peers.

II. WHERE IMPOSITION OF A PRISON SENTENCE OF LESS THAN SIX MONTHS WILL NECESSARILY INFLICT A FURTHER PENALTY UPON A DEFENDANT IN THE EXERCISE OF DEFENDANT'S FUNDAMENTAL CONSTITUTIONAL RIGHTS, THE OFFENSE MUST BE DEFINED AS A "SERIOUS" OFFENSE WITHIN THE GUIDELINES ESTABLISHED BY THIS COURT.

Petitioners submit that, even where an individual offense may be considered "petty" under sentencing criteria, the imposition of a further penalty that would impact on the ability of Petitioners' ability to exercise their First Amendment rights is sufficient to classify the offense as "serious," and implicate the right to trial by jury.

This Court, in *Blanton*, discussed the "objective indications of the seriousness with which society regards the offense," (*Blanton*, 489 U.S. at 541 (quoting *Frank v. U.S.*, 395 U.S. 147, 148, 89 S.Ct. 1503, 1505, 23 L.Ed.2d. 162 (1969)). Since *Blanton*, the seriousness of the offense has largely been interpreted to be that maximum penalty authorized by the legislature, as representative of the people. However, the people of the United States are also represented by the Constitution, and Petitioners' believe that any proper interpretation of the seriousness accorded any offense must include consideration of statutory *and* Constitutional enactments.

Thus, incarcerating a defendant convicted of a charge arising out of an explicit exercise of that defendant's free speech rights, deprives the convicted person of the ability to exercise that constitutional right for the duration of the incarceration. In such a case, the defendant (and perhaps society itself) may see the penalty chilling the speech as more important than the imprisonment.

Recognition of the importance of jealously protecting our Constitutional freedoms in prosecuting criminal activity was given by the courts in *U.S. v. Thomas*, 574 F.Supp. 197 (D.D.C. 1983), *affirmed without opinion*, 753 F.2d 167 (D.C. Cir. 1984). A charge subjecting the defendant to imprisonment of not more than six months and a fine of not more than $500 was filed for a violation of an Interior Department regulation against placing a structure on the White House sidewalk. Defendant had erected a cardboard "missile" on the sidewalk expressly to protest public policy to which he was opposed.

The court in *Thomas* held that the offense charged must be considered "serious," and not "petty," since a conviction "could have a chilling effect on a variety of future protest activities by defendant and others." (*Id.*) The First Amendment implications of the charge therefore constituted an additional penalty, over

and above the statutorily prescribed ones, and entitled the defendant to a jury trial. As the court stated:

> [T]he defendant's alleged conduct has two elements: one proscribed and one constitutionally protected. Confinement as a punishment for the proscribed element would spill over onto the constitutionally protected element. The risk to the constitutionally protected conduct inherent in the sanction imposable for the proscribed conduct escalates the crime from the petty to one for which a jury trial should be available to a defendant who demands one. . . [T]he primary purpose of the jury is to prevent the possibility of oppression by the Government.

Id. at 199 and n.3 (quoting *Baldwin*, 399 U.S. at 72 (1970)).

In *U.S. v. McAlister*, 630 F.2d 772 (10th Cir. 1980), the Court of Appeals stated that "[u]nless the right to a trial by jury in cases such as this has been clearly abrogated by history and reason, a defendant should have the benefit of the constitutional protection, " (*Id.* at 774 (citing *Owen v. City of Independence*, 445 U.S. 622, 652 (1980).)

The instant case is one implicating the fundamental constitutional right of all citizens to protest policies which they oppose, and Petitioners respectfully request that this Court consider the Constitutional issues in deciding to grant certiorari.

CONCLUSION

Petitioners submit that the constitutional right of a trial by jury afforded defendants under Amendments VI and XIV of the United States Constitution extend to those defendants charged with multiple offenses arising out of one incident.

Petitioners further submit that, where constitutional free speech rights are implicated in the activity giving rise to criminal charges, the further penalty imposed on the defendants by the chilling of their First Amendment right of free speech requires the granting of a jury trial.

Accordingly, we respectfully request that this Court reverse the decision of the lower courts with respect to the granting of a jury trial to Petitioners.

Respectfully submitted,

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March 24, 1995

COMPLAINT FILED 01/06/92
DATA NO. 0493042
ARREST NO. X95701

DOUGLAS COUNTY COURT, NEBRASKA
MISD/TRAFFIC REGISTER OF ACTIONS AND ORDER

CASE NO. 92 M 0000273
DOCKET NO. 91 M 0036417
ACTION TRIAL
DATE/TIME 03/02/92 0900

The State of Nebraska, Plaintiff, vs.

STREMPLEPADIOS, LISA K AKA: PADIOSSTRIMPLE, LISA DOB: 11/16/55, Defendant

Charge 1	001 M	OBST ADM LAW	Amended to		Statute	20-21	Conv. Code 23606
Charge 2	002 M	TRESPASS	Amended to		Statute	20-154	Conv. Code 23616
Charge 3	003 M	REQ TO LEAVE	Amended to		Statute	20-155	Conv. Code 23617
Charge 4			Amended to		Statute		Conv. Code
Charge 5			Amended to		Statute		Conv. Code

BOND:

END

APPEARANCES

☒ Defendant; ☒ Defense Counsel T. Kotulich; ☐ Parents or Guardian _____;
☒ Prosecutor M. Skepnek; ☐ _____.

ARRAIGNMENT AND ADVISEMENT

☐ Defendant advised of the nature of the above charges, all possible penalties, and each of the following rights: Trial; Jury Trial; Confront Accusers; Subpoena Witnesses; Remain Silent; Counsel; Request Transfer to Juvenile Court; Defendant's Presumption of Innocence; State's Burden of Proof Beyond Reasonable Doubt.
☐ Defendant waived each of the above and foregoing rights.
☐ Plea(s) entered knowingly, understandingly, intelligently, voluntarily, and a factual basis for plea(s) found; defendant advised of right to appeal conviction and sentence.
☐ Indigency inquiry held; ☐ Defendant adjudged indigent, Public Defender appointed. ☐ Defendant adjudged not indigent.
☐ Defendant will hire own counsel. _____ ☐ Employed _____
☐ Defendant enters plea(s) of: Guilty 1( )2( )3( )4( )5( ) No Contest 1( )2( )3( )4( )5( ) Not Guilty 1( )2( )3( )4( )5( )
☐ Defendant is found: Guilty 1( )2( )3( )4( )5( )
☐ Case set for trial on _____, 19____ at _____ in Courtroom No. _____.
☐ Bond set at $ _____ ☐ 10%; ☐ Signature; ☐ ROR; ☐ Pre-Trial Release.
☐ Charge(s) 1( )2( )3( )4( )5( ) dismissed on motion of ☐ Prosecutor; ☐ Defense; ☐ Court.
☐ Presentence ordered: 1( )2( )3( )4( )5( ) ☐ Transferred to Juvenile Court.

TRIAL/MOTION HEARING

☒ Trial held; Defendant found: Guilty 1(X)2(X)3(X)4( )5( ) Not Guilty 1( )2( )3( )4( )5( )
☐ Motion hearing held; ☐ above motion; ☐ motion to _____ ☐ granted; ☐ denied; ☐ order attached.
☐ Enhancement hearing held. Court finds _____.
☐ Exhibits introduced: Nos. _____ thru _____. Received _____.
☐ Case continued to _____, 19____ at _____ on motion of ☐ Prosecutor; ☐ Defense; ☐ Court.
☐ Presentence ordered. 1( )2( )3( )4( )5( ) ☐ Charge(s) 1( )2( )3( )4( )5( ) dismissed. ☐ Case taken under advisement.

SENTENCING

☒ Defendant ordered to pay fine of: (1) $ 50 (2) $ 50 (3) $ 50 (4) $ _____ (5) $ _____ Total $ 150 and all costs of prosecution.
☒ Execution of $ 75.30 is suspended until April 2, 92; ☐ Defendant to stand committed to Corrections Center until fine and costs are paid.
☐ Defendant is sentenced to the Corrections Center for a term of (1) ____ (2) ____ (3) ____ (4) ____ (5) ____ Total ____ days and is to pay the costs of this prosecution. ☐ Execution of sentence suspended until _____.
☐ Defendant is ordered not to drive a motor vehicle and his/her driver's license is ☐ suspended; ☐ impounded; ☐ revoked for a period of ____ months ☐ from date of discharge from jail or payment of fine, whichever is the latter; ☐ as of _____, 19____.
☐ Defendant is placed on probation according to terms of a separate order.

ADDITIONAL ENTRIES OF RECORD

☐ Defendant fails to appear; ☐ Capias to issue; ☐ Bond set at $ _____; ☐ Mittimus to issue; ☐ Capias cancelled.
☐ Bond in the amount of $ _____ ☐ forfeited; ☐ reinstated; ☐ released; ☒ Appeal bond set at $ 200
☒ Court Costs $ 21.00 ☐ Witness Fees $ _____ ☐ Sheriff Fees $ _____ ☒ Subpoena Fees $ 2.30 ☐ Other $ _____
☐ _____

Hon. [signature] 3-2-92 5:30 5-7-54

OMPLAIN. FILED 12/26/91
ATA NO. 0066515
RREST NO. F62745

DOUGLAS COUNTY COURT, NEBRASKA
MISD/TRAFFIC REGISTER OF ACTIONS
AND ORDER

CASE NO. 91 M 0023593
DOCKET NO. 91 M 0036357
ACTION SENTENCING
DATE/TIME 03/26/92 0900

The State of Nebraska, Plaintiff, vs.

OERING. KENNETH E AKA: _____ DOB: 03/24/45 , Defendant

harge 1	001 M TRESPASS	Amended to		Statute 20-154	Conv. Code 23616
harge 2	002 M REG TO LEAVE	Amended to		Statute 20-155	Conv. Code 23617
harge 3	003 M OBST ADM LAW	Amended to		Statute 20-21	Conv. Code 23606
harge 4		Amended to		Statute	Conv. Code
harge 5		Amended to		Statute	Conv. Code

IOND: ** SEE FILE FOR BONDS **

**END*

APPEARANCES

☒ Defendant; ☒ Defense Counsel Rollheiser; ☐ Parents or Guardian _____;
☒ Prosecutor R. Rheinpost; ☐ _____.

ARRAIGNMENT AND ADVISEMENT

☐ Defendant advised of the nature of the above charges, all possible penalties, and each of the following rights: Trial; Jury Trial; Confront Accusers; Subpoena Witnesses; Remain Silent; Counsel; Request Transfer to Juvenile Court; Defendant's Presumption of Innocence; State's Burden of Proof Beyond Reasonable Doubt.
☐ Defendant waived each of the above and foregoing rights.
☐ Plea(s) entered knowingly, understandingly, intelligently, voluntarily, and a factual basis for plea(s) found; defendant advised of right to appeal conviction and sentence.
☐ Indigency inquiry held; ☐ Defendant adjudged indigent, Public Defender appointed. ☐ Defendant adjudged not indigent.
☐ Defendant will hire own counsel. _____ ☐ Employed _____
☐ Defendant enters plea(s) of: Guilty 1( )2( )3( )4( )5( ) No Contest 1(X)2(X)3(X)4( )5( ) Not Guilty 1( )2( )3( )4( )5( )
☐ Defendant is found: Guilty 1( )2( )3( )4( )5( )
☐ Case set for trial on _____, 19 ____ at _____ in Courtroom No. _____.
☐ Bond set at $ _____ ☐ 10%; ☐ Signature; ☐ ROR; ☐ Pre-Trial Release.
☐ Charge(s) 1( )2( )3( )4( )5( ) dismissed on motion of ☐ Prosecutor; ☐ Defense; ☐ Court.
☐ Presentence ordered: 1( )2( )3( )4( )5( ) ☐ Transferred to Juvenile Court.

TRIAL/MOTION HEARING

☐ Trial held; Defendant found: Guilty 1( )2( )3( )4( )5( ) Not Guilty 1( )2( )3( )4( )5( )
☐ Motion hearing held; ☐ above motion; ☐ motion to _____ ☐ granted; ☐ denied; ☐ order attached.
☐ Enhancement hearing held. Court finds _____.
☐ Exhibits introduced: Nos. _____ thru _____. Received _____.
☐ Case continued to _____, 19 ____ at _____ on motion of ☐ Prosecutor; ☐ Defense; ☐ Court.
☐ Presentence ordered. 1( )2( )3( )4( )5( ) ☐ Charge(s) 1( )2( )3( )4( )5( ) dismissed. ☐ Case taken under advisement.

SENTENCING

☒ Defendant ordered to pay fine of: (1) $ 50 (2) $ 50 (3) $ 50 (4) $ _____ (5) $ _____ Total $ 150 and all costs of prosecution.
☐ Execution of $ _____ is suspended until _____, 19 ____; ☐ Defendant to stand committed to Corrections Center until fine and costs are paid.
☐ Defendant is sentenced to the Corrections Center for a term of (1) ____ (2) ____ (3) ____ (4) ____ (5) ____ Total ____ days and is to pay the costs of this prosecution. ☒ Execution of sentence suspended until 4-5-92.
☐ Defendant is ordered not to drive a motor vehicle and his/her driver's license is ☐ suspended; ☐ impounded; ☐ revoked for a period of _____ months ☐ from date of discharge from jail or payment of fine, whichever is the latter; ☐ as of _____, 19 ____.
☐ Defendant is placed on probation according to terms of a separate order.

* will sit out fines + costs if not appealed

ADDITIONAL ENTRIES OF RECORD

☐ Defendant fails to appear; ☐ Capias to issue; ☐ Bond set at $ _____; ☐ Mittimus to issue; ☐ Capias cancelled.
☐ Bond in the amount of $ _____ ☐ forfeited; ☐ reinstated; ☐ released; ☒ Appeal bond set at $ 500
☒ Court Costs $ 24.00 ☐ Witness Fees $ _____ ☐ Sheriff Fees $ _____ ☒ Subpoena Fees $ 7.30 ☐ Other $ _____
☐ _____

Hon. _____ Judge 3/26/92 Date _____ Bailiff 1992 143 0000 -762 Tape Nos.

CR/TR 239 (7/90)

COMPLAINT FILED 12/26/91
DATA NO. 0485948
ARREST NO. F62736

DOUGLAS COUNTY COURT, NEBRASKA
MISD/TRAFFIC REGISTER OF ACTIONS
AND ORDER

CASE NO. 91 M 0033599
DOCKET NO. 91 M 0036333
ACTION SENTENCING
DATE/TIME 03/26/92 0900

The State of Nebraska, Plaintiff, vs.

VOLQUARTSEN, EMILIE J AKA: _____ DOB: 11/26/41, Defendant

Charge 1	001 M TRESPASS	Amended to		Statute 20-154	Conv. Code 23616
Charge 2	002 M REQ TO LEAVE	Amended to		Statute 20-155	Conv. Code 23617
Charge 3	003 M OBST ADM LAW	Amended to		Statute 20-21	Conv. Code 23606
Charge 4		Amended to		Statute	Conv. Code
Charge 5		Amended to		Statute	Conv. Code

BOND: ** SEE FILE FOR BONDS **

END

APPEARANCES

☒ Defendant; ☒ Defense Counsel L. Bellamore; ☐ Parents or Guardian _____;
☒ Prosecutor D. Mueller; ☐ _____.

ARRAIGNMENT AND ADVISEMENT

☐ Defendant advised of the nature of the above charges, all possible penalties, and each of the following rights: Trial; Jury Trial; Confront Accusers; Subpoena Witnesses; Remain Silent; Counsel; Request Transfer to Juvenile Court; Defendant's Presumption of Innocence; State's Burden of Proof Beyond Reasonable Doubt.

☐ Defendant waived each of the above and foregoing rights.

☐ Plea(s) entered knowingly, understandingly, intelligently, voluntarily, and a factual basis for plea(s) found; defendant advised of right to appeal conviction and sentence.

☐ Indigency inquiry held; ☐ Defendant adjudged indigent, Public Defender appointed. ☐ Defendant adjudged not indigent.

☐ Defendant will hire own counsel. _____ ☐ Employed _____

☐ Defendant enters plea(s) of: Guilty 1( )2( )3( )4( )5( ) No Contest 1( )2( )3( )4( )5( ) Not Guilty 1( )2( )3( )4( )5( )

☐ Defendant is found: Guilty 1( )2( )3( )4( )5( )

☐ Case set for trial on _____, 19 ____ at _____ in Courtroom No. _____.

☐ Bond set at $ _____ ☐ 10%; ☐ Signature; ☐ ROR; ☐ Pre-Trial Release.

☐ Charge(s) 1( )2( )3( )4( )5( ) dismissed on motion of ☐ Prosecutor; ☐ Defense; ☐ Court.

☐ Presentence ordered: 1( )2( )3( )4( )5( ) ☐ Transferred to Juvenile Court.

TRIAL/MOTION HEARING

☒ Trial held; Defendant found: Guilty 1(X)2(X)3(X)4( )5( ) Not Guilty 1( )2( )3( )4( )5( )

☐ Motion hearing held; ☐ above motion; ☐ motion to _____ ☐ granted; ☐ denied; ☐ order attached.

☐ Enhancement hearing held. Court finds _____.

☐ Exhibits introduced: Nos. _____ thru _____. Received _____.

☐ Case continued to _____, 19 ____ at _____ on motion of ☐ Prosecutor; ☐ Defense; ☐ Court.

☐ Presentence ordered. 1( )2( )3( )4( )5( ) ☐ Charge(s) 1( )2( )3( )4( )5( ) dismissed. ☐ Case taken under advisement.

SENTENCING

☐ Defendant ordered to pay fine of: (1) $ ____ (2) $ ____ (3) $ ____ (4) $ ____ (5) $ ____ Total $ _____ and all costs of prosecution.

☐ Execution of $ _____ is suspended until _____, 19 ____; ☐ Defendant to stand committed to Corrections Center until fine and costs are paid.

☒ Defendant is sentenced to the Corrections Center for a term of (1) 10 (2) 10 (3) 10 (4) ____ (5) ____ Total 10 days and is to pay the costs of this prosecution. ☒ Execution of sentence suspended until 4-5-92.

☐ Defendant is ordered not to drive a motor vehicle and his/her driver's license is ☐ suspended; ☐ impounded; ☐ revoked for a period of _____ months ☐ from date of discharge from jail or payment of fine, whichever is the latter; ☐ as of _____, 19 ____.

☐ Defendant is placed on probation according to terms of a separate order.

ADDITIONAL ENTRIES OF RECORD

☐ Defendant fails to appear; ☐ Capias to issue; ☐ Bond set at $ _____; ☐ Mittimus to issue; ☐ Capias cancelled.

☐ Bond in the amount of $ _____ ☐ forfeited; ☐ reinstated; ☐ released; ☒ Appeal bond set at $ Zero

☒ Court Costs $ 200 ☐ Witness Fees $ _____ ☐ Sheriff Fees $ _____ ☒ Subpoena Fees $ 230 ☐ Other $ _____

☐ _____

Hon. W. Colwell C. 3/26/92 J. Tiff Tape Nos. 147-0000-767 CR/TR 239 (7/90)
Date Bailiff

OMPLAINT FILED 12/[illegible]/91
ATA NO. [illegible]
RREST NO. F62735

DOUGLAS COUNTY COURT, NEBRASK
MISD/TRAFFIC REGISTER OF ACTIONS
AND ORDER

CASE NO. 91 M 0023576
DOCKET NO. 91 M 0036313
ACTION SENTENCING
DATE/TIME 03/26/92 0900

The State of Nebraska, Plaintiff, vs.

OWEN, ANN M AKA: _____ DOB: 11/26/42 , Defendant

Charge 1	001 M	TRESPASS	Amended to		Statute	20-154	Conv. Code 23616
Charge 2	002 M	REF TO LEAVE	Amended to		Statute	20-155	Conv. Code 23617
Charge 3	003 M	OBST ADM LAW	Amended to		Statute	20-21	Conv. Code 23606
Charge 4			Amended to		Statute		Conv. Code
Charge 5			Amended to		Statute		Conv. Code

BOND: ** SEE FILE FOR BONDS **

END

APPEARANCES

☐ Defendant; ☐ Defense Counsel _____ ; ☐ Parents or Guardian _____ ;
☒ Prosecutor K. Shepodd ; ☐ _____ .

ARRAIGNMENT AND ADVISEMENT

☐ Defendant advised of the nature of the above charges, all possible penalties, and each of the following rights: Trial; Jury Trial; Confront Accusers; Subpoena Witnesses; Remain Silent; Counsel; Request Transfer to Juvenile Court; Defendant's Presumption of Innocence; State's Burden of Proof Beyond Reasonable Doubt.
☐ Defendant waived each of the above and foregoing rights.
☐ Plea(s) entered knowingly, understandingly, intelligently, voluntarily, and a factual basis for plea(s) found; defendant advised of right to appeal conviction and sentence.
☐ Indigency inquiry held: ☐ Defendant adjudged indigent, Public Defender appointed. ☐ Defendant adjudged not indigent.
☐ Defendant will hire own counsel. _____ ☐ Employed _____
☐ Defendant enters plea(s) of: Guilty 1 ( )2 ( )3 ( )4 ( )5 ( ) No Contest 1 ( )2 ( )3 ( )4 ( )5 ( ) Not Guilty 1 ( )2 ( )3 ( )4 ( )5 ( )
☒ Defendant is found: Guilty 1 ( )2 (X)3 (X)4 ( )5 ( )
☐ Case set for trial on _____ , 19 ____ at _____ in Courtroom No. _____ .
☐ Bond set at $ _____ ☐ 10%; ☐ Signature; ☐ ROR; ☐ Pre-Trial Release.
☐ Charge(s) 1 ( )2 ( )3 ( )4 ( )5 ( ) dismissed on motion of ☐ Prosecutor; ☐ Defense; ☐ Court.
☐ Presentence ordered: 1 ( )2 ( )3 ( )4 ( )5 ( ) ☐ Transferred to Juvenile Court.

TRIAL/MOTION HEARING

☐ Trial held; Defendant found: Guilty 1 ( )2 ( )3 ( )4 ( )5 ( ) Not Guilty 1 ( )2 ( )3 ( )4 ( )5 ( )
☐ Motion hearing held: ☐ above motion; ☐ motion to _____ ☐ granted; ☐ denied; ☐ order attached.
☐ Enhancement hearing held. Court finds _____ .
☐ Exhibits introduced: Nos. _____ thru _____ . Received _____ .
☐ Case continued to _____ , 19 ____ at _____ on motion of ☐ Prosecutor; ☐ Defense; ☐ Court.
☐ Presentence ordered. 1 ( )2 ( )3 ( )4 ( )5 ( ) ☐ Charge(s) 1 ( )2 ( )3 ( )4 ( )5 ( ) dismissed. ☐ Case taken under advisement.

SENTENCING

☐ Defendant ordered to pay fine of: (1) $ ____ (2) $ ____ (3) $ ____ (4) $ ____ (5) $ ____ Total $ _____ and all costs of prosecution.
☐ Execution of $ _____ is suspended until _____ , 19 ____ ; ☐ Defendant to stand committed to Corrections Center until fine and costs are paid.
☒ Defendant is sentenced to the Corrections Center for a term of (1) 10 (2) 10 (3) 10 (4) ____ (5) ____ Total 10 days and is to pay the costs of this prosecution. ☒ Execution of sentence suspended until 4-5-92 .
☐ Defendant is ordered not to drive a motor vehicle and his/her driver's license is ☐ suspended; ☐ impounded; ☐ revoked for a period of _____ months ☐ from date of discharge from jail or payment of fine, whichever is the latter; ☐ as of _____ , 19 ____ .
☐ Defendant is placed on probation according to terms of a separate order.

ADDITIONAL ENTRIES OF RECORD

☐ Defendant fails to appear; ☐ Capias to issue; ☐ Bond set at $ _____ ; ☐ Mittimus to issue; ☐ Capias cancelled.
☐ Bond in the amount of $ _____ ☐ forfeited; ☐ reinstated; ☐ released; ☒ Appeal bond set at $ 2000
☐ Court Costs $ _____ ☐ Witness Fees $ _____ ☐ Sheriff Fees $ _____ ☐ Subpoena Fees $ _____ ☐ Other $ _____
☐ _____

Hon. [illegible] Judge 3/26/92 Date [illegible] Bailiff CR92# 142-0000-76 Tape Nos.

CR/TR 239 (7/90)

I, Walter H. Cropper, County Judge for Douglas County Court in the Fourth Judicial District of the State of Nebraska, do hereby settle and allow the within and following as the bill of exceptions in this case; do hereby state that the tape recording from which this bill of exceptions was prepared, is the official record made at the time of the proceedings had in or at the trial of the foregoing cause in said court ; and that said tape recording constituting the official record has been at all times in the custody and/or under the control of the County Court.

Dated this 23rd day of April, 1992.

/s/_____
COUNTY JUDGE

* * * * *

THE COURT: Yeah. The burden of proof rests upon the State to prove each and every element beyond a reasonable doubt. And that's really all the lawsuit is about. Now my own personal convictions do not involve in this at all. So we'll just stick to what the allegations are. Trespassing - Purposely or knowingly entered upon the property of the Women's Medical Center of Nebraska without being invited, licensed or privileged to do so. I feel the testimony of Sergeant Fidone is borne out in the Exhibit 1 document — it's quite clear — coupled with his own testimony. I find guilt beyond a reasonable doubt on that. Now the request to leave, once again from my notes here, which Sergeant Fidone said, "They blocked the entrance gate." The sergeant told the defendants to leave. They were given, in fact, one minute to leave. They didn't. I find them guilty of that. They failed to refuse to leave the property of another person after being so notifed by the owner, occupant or person in control. Now, as to the third charge, obstructing the administration of law, there the State has to show that the defendants purposely or knowingly — where is the verb — refused to do any act or commit any act of omission with the intent to obstruct or intefere with any law enforcement officer. There, the sergeant went on and said all were charged with trespass, and told if they didn't leave, they'd be charged with resisting, which really doesn't involve itself here. Or a comparable ordinance would take its place. Now obstructing the administration of law is quite clear. Passive resistance is what was contemplated, and by the change in the ordinance, I think they caught it. I feel that they've all been proved beyond a reasonable doubt; and therefore, accordingly, I will find guilt. Now — What about penalties? Do you want me to run over all those now?

IN THE
DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

Docket 130 Page 600

THE STATE OF NEBRASKA,

Plaintiff,

vs.

KENNETH E. GOERING,

Defendant.

Order

On the 4th day of November, 1993 hearing was had on the appeal of the defendant from the final judgment and sentence of the County Court of Douglas County, Nebraska. Oral arguments were made and the matter was taken under advisement.

Upon consideration thereof, the Court finds that the record supports the final judgments and sentences of the defendant on the complaint charging the defendant with the crime of obstructing administration of law and on the complaint charging the defendant with the crime of refusing request to leave, and that, therefore, said final judgments and sentences should be affirmed.

The Court further finds that the record does not support the final judgment and sentence on the complaint charging the defendant with the crime of trespassing and that, therefore, said final judgment and sentence should be reversed with direction to dismiss the complaint.

WHEREFORE, IT IS ORDERED that the final judgments and sentences of the Douglas County Court for the crimes of obstructing administration of law and refusing request to leave be and the same are hereby affirmed.

IT IS FURTHER ORDERED that the final judgments and sentences of the Douglas County Court for the crimes of trespassing be and the same is hereby reversed and the case is remanded to the Douglas County Court with direction to dismiss the complaint.

Dated: November 17, 1993

BY THE COURT:

/s/_____
JUDGE

IN THE
DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

Docket 130 Page 597

THE STATE OF NEBRASKA,

Plaintiff,

vs.

ANN M. BOWEN,

Defendant.

Order

On the 4th day of November, 1993 hearing was had on the appeal of the defendant from the final judgment and sentence of the County Court of Douglas County, Nebraska. Oral arguments were made and the matter was taken under advisement.

Upon consideration thereof, the Court finds that the record supports the final judgments and sentences of the defendant on the complaint charging the defendant with the crime of obstructing administration of law and on the complaint charging the defendant with the crime of refusing request to leave, and that, therefore, said final judgments and sentences should be affirmed.

The Court further finds that the record does not support the final judgment and sentence on the complaint charging the defendant with the crime of trespassing and that, therefore, said final judgment and sentence should be reversed with direction to dismiss the complaint.

WHEREFORE, IT IS ORDERED that the final judgments and sentences of the Douglas County Court for the crimes of obstructing administration of law and refusing request to leave be and the same are hereby affirmed.

IT IS FURTHER ORDERED that the final judgment and sentence of the Douglas County Court for the crime of trespassing be and the same is hereby reversed and the case is remanded to the Douglas County Court with direction to dismiss the complaint.

Dated: November 17, 1993.

BY THE COURT:

/s/
JUDGE

IN THE
DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

Docket 130 Page 379

THE STATE OF NEBRASKA,

Plaintiff,

vs.

LISA K. STRIMPLE-PADIOS,

Defendant.

Order

On the 4th day of November, 1993 hearing was had on the appeal of the defendant from the final judgment and sentence of the County Court of Douglas County, Nebraska. Oral arguments were made and the matter was taken under advisement.

Upon consideration thereof, the Court finds that the record supports the final judgments and sentences of the defendant on the complaint charging the defendant with the crime of obstructing administration of law and on the complaint charging the defendant with the crime of refusing request to leave, and that, therefore, said final judgments and sentences should be affirmed.

The Court further finds that the record does not support the final judgment and sentence on the complaint charging the defendant with the crime of trespassing and that, therefore, said final judgment and sentence should be reversed with direction to dismiss the complaint.

WHEREFORE, IT IS ORDERED that the final judgments and sentences of the Douglas County Court for the crimes of obstructing administration of law and refusing request to leave be and the same are hereby affirmed.

IT IS FURTHER ORDERED that the final judgment and sentence of the Douglas County Court for the crime of trespassing be and the same is hereby reversed and the case is remanded to the Douglas County Court with direction to dismiss the complaint.

Dated: November 17, 1993

BY THE COURT:

/s/
JUDGE

IN THE
DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

Docket 130 Page 602

THE STATE OF NEBRASKA,

Plaintiff,

vs.

EMILIE J. VOLQUARTSEN,

Defendant.

Order

On the 4th day of November, 1993 hearing was had on the appeal of the defendant from the final judgment and sentence of the County Court of Douglas County, Nebraska. Oral arguments were made and the matter was taken under advisement.

Upon consideration thereof, the Court finds that the record supports the final judgments and sentences of the defendant on the complaint charging the defendant with the crime of obstructing administration of law and on the complaint charging the defendant with the crime of refusing request to leave, and that, therefore, said final judgments and sentences should be affirmed.

The Court further finds that the record does not support the final judgment and sentence on the complaint charging the defendant with the crime of trespassing and that, therefore, said final judgment and sentence should be reversed with direction to dismiss the complaint.

WHEREFORE, IT IS ORDERED that the final judgments and sentences of the Douglas County Court for the crimes of obstructing administration of law and refusing request to leave be and the same are hereby affirmed.

IT IS FURTHER ORDERED that the final judgment and sentence of the Douglas County Court for the crime of trespassing be and the same is hereby reversed and the case is remanded to the Douglas County Court with direction to dismiss the complaint.

Dated: November 17, 1993

BY THE COURT:

/s/
JUDGE

OPINION OF THE NEBRASKA COURT OF APPEALS

(Not Designated for Permanent Publication)

Case Title

State of Nebraska,

Appellee,

v.

Kenneth E. Goering et al.,

Appellants.

Case Caption

State v. Goering

Filed October 25, 1994.

Nos. A-93-1128, A-93-1129, A-93-1130, A-93-1133.

Appeal from the District Court for Douglas County, James A. Buckley, Judge, on appeal thereto from the County Court for Douglas County, Walter H. Cropper, Judge. Judgment of District Court affirmed.

Peter C. Bataillon, of Sodoro, Daly & Sodoro, for appellants.

Herbert M. Fitle, Omaha City Attorney, and Gary P. Bucchino, Omaha City Prosecutor, and Richard L. Dunning for appellee.

STATE V. GOERING

NOS. A-93-1128, A-93-1129, A-93-1130, A-93-1133 - filed October 25, 1994.

1. Judgments: Presumptions: Appeal and Error. In a case tried to the court without a jury, there is a presumption that the trial court, in reaching its decision, considered only evidence that is competent and relevant. This court will not overturn such a decision where there is sufficient material, competent, and relevant evidence to sustain the judgment.

2. Courts: Appeal and Error. In an appeal from county court to district court, the district court reviews the case for error appearing on the record.

3. Constitutional Law: Criminal Law: Jury Trials. There is no constitutional right to trial by jury for petty offenses carrying a maximum sentence of 6 months or less.

4. Constitutional Law: Presumptions: Jury Trials. Offenses carrying a maximum prison term of 6 months are presumed by society and for purposes of the Sixth Amendment to be petty and do not require a jury trial.

5. Criminal Law: Jury Trials. Petty crimes do not require a jury trial, whereas serious offenses entitle a defendant to trial by jury.

6. ___: ___. As to offenses for which authorized incarceration is less than 6 months, seriousness, and hence a right to jury trial, is to be ascertained by reference to objective indications of the seriousness with which society regards the offense.

7. Criminal Law: Legislature. The prime indicator of society's judgment about the seriousness of an offense is the maximum penalty authorized by a legislature.

8. Criminal Law: Trial. Trying petty offenses together as a procedural device does not alter or elevate the seriousness of any of the crimes charged.

9. Constitutional Law: Criminal Law: Jury Trials. The appropriate constitutional inquiry regarding the right to a jury trial is an examination of the individual offenses charged, not a review of their accumulated penalties.

Irwin, Miller-Lerman, and Mues, Judges.

MILLER-LERMAN, Judge.

Emilie J. Volquartsen, Lisa K. Strimple-Padios, Ann M. Bowen, and Kenneth E. Goering were charged and convicted in county court of violating three Omaha city ordinances: "Trespass," "Request to leave," and "Obstructing Administration of Law," codified at Omaha Mun. Code, ch. 20, art. VI §§ 20-154 and 20-155, and at Omaha Mun. Code, ch. 20, art. II, § 20-21 (1991). Three separate complaints, each charging one crime, were filed against each defendant. The charges arose when the above-named defendants along with 28 other protesters, who are not parties to this appeal, blocked the entrance to the Women's Medical Center on 49th and L Streets in Omaha, Nebraska, on December 14, 1991. Each of the above-named defendants was found guilty as charged and was individually sentenced. Each appealed to the district court. The district court reversed each defendant's conviction for trespass, holding that there was insufficient evidence in the record to support those portions of the judgments. The remaining portions of the judgments were affirmed. The defendants subsequently perfected these appeals, asserting that the trial court erred in (1) refusing to allow them to assert the defense of justification, (2) denying them a jury trial, and (3) finding that the evidence was sufficient to sustain convictions for violating the "Request to leave" and "Obstructing Administration of Law" ordinances. For the reasons recited below, we affirm the district court's judgments affirming portions of the county court's judgments.

SCOPE OF REVIEW

[1] In a case tried to the court without a jury, there is a presumption that the trial court, in reaching its decision, considered only evidence that is competent and relevant. This court will not overturn such a decision where there is sufficient

material, competent, and relevant evidence to sustain the judgment.

State v. Twohig, 238 Neb. 92, 469 N.W.2d 344 (1991); *State v. Blair*, 230 Neb. 775, 433 N.W.2d 518 (1988); *State v. Methe*, 228 Neb. 468, 422 N.W.2d 803 (1988).

[2] In an appeal from county court to district court, the district court reviews the case for error appearing on the record. Neb. Rev. State. § 25-2733 (Reissue 1989). That is also the standard of review for this court. See Neb. Rev. Stat. § 25-1911 (Cum. Supp. 1992).

FACTS

The parties to this action stipulated as to what the witnesses would say had they testified. The State offered that the representative of the medical center would testify that on December 14, 1991, at approximately 8 a.m. a group of protesters entered onto the private property of the medical center and barred the entrance gate to the center. The protesters were asked to leave by the representative, and when they did not the police were called. When the police arrived, the protesters were again asked to leave, and when they did not they were warned that if they remained they would be subject to arrest for trespassing and refusing to leave private property. After police gave the protesters 1 minute to leave, each protester was approached by officers who explained that they were under arrest and that if they had to be carried to the police bus, they would also be charged with obstructing the administration of law. Each of the above-named defendants had to be carried to the bus. They were then transported to the police station and charged with violating the above-identified city ordinances. The county court found all the above-named defendants guilty of each offense. Volquartsen and Bowen were sentenced to 10 days' incarceration for each count, to be served concurrently, for a total of 10 days' jail time, and Strimple-Padios and Goering were fined $50 per count for a total of $150. Other protesters who are not parties to this

appeal received different, and in some cases greater, sentences. On appeal to the district court, the conviction for trespass was reversed for each defendant. This reversal is not before us, and this court addresses only the errors assigned by the defendants.

JURY TRIAL

In three separate complaints filed against each defendant, the defendants were charged with violating three Omaha city ordinances: trespass, request to leave, and obstructing administration of law. Each violation is punishable by a maximum of a $500 fine, 6 months' imprisonment, or both, at the discretion of the trial judge.

The defendants assert that the trial court erred in refusing to allow them a jury trial. The defendants rely on the Nebraska Constitution, which states: "The right of trial by jury shall remain inviolate," Neb. Const. art. I, § 6, and "[i]n all criminal prosecutions the accused shall have the right to . . . a speedy public trial by an impartial jury," Neb. Const. art. I, § 11. The defendants also rely on the U.S. Constitution to the same effect. See U.S. Const. amends VI and XIV.

[3-5] Notwithstanding the quoted constitutional provisions, not every criminal charge is triable to a jury. Consistent with U.S. Supreme Court authority, the Nebraska Supreme Court historically and frequently concluded that there is no constitutional right to trial by jury for petty offenses carrying a maximum sentence of 6 months or less. *State v. Miller*, 226 Neb. 576, 412 N.W.2d 849 (1987); *State v. Kennedy*, 224 Neb. 164, 396 N.W.2d 722 (1986); *State v. Lynch*, 223 Neb. 849, 394 N.W. 2d 651 (1986). In 1989, in *Blanton v. North Las Vegas*, 489 U.S. 538, 109 S. Ct. 1289, 103 L. Ed. 2d 550 (1989), the U.S. Supreme Court stated that offenses carrying a maximum prison term of 6 months are presumed by society and for purposes of the Sixth Amendment to be "petty" and do not require a jury trial. The Court continued:

> A defendant is entitled to a jury trial in such circumstances only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a "serious" one. This standard, albeit somewhat imprecise, should ensure the availability of a jury trial in the rare situation where a legislature packs an offense it deems "serious" with onerous penalties that nonetheless "do not puncture the 6-month incarceration line." '[Quoting from the brief for petitioners.]

489 U.S. at 543. Thus, the focus of *Blanton* is on the issue of whether the crime charged is "petty" or "serious." "Petty" crimes do not require a jury trial, whereas "serious" offenses entitle a defendant to trial by jury.

Following *Blanton*, as interpreted by the U.S. Court of Appeals for the Eighth Circuit in *Richter v. Fairbanks*, 903 F. 2d 1202 (8th Cir. 1990), the Nebraska Supreme Court in 1992 concluded that a defendant charged with third-offense driving while intoxicated (DWI), punishable by up to 6 months in jail and a 15-year license suspension, was charged with a "serious" offense and was therefore entitled to a jury trial. *State v. Wiltshire*, 241 Neb. 817, 491 N.W.2d 324 (1992). In *Wiltshire*, the defendant was charged with DWI, in violation of a municipal ordinance, and asserted that he was entitled to a jury trial because the DWI was a third offense, and in addition to a 6-month sentence, he was subject to a 15-year license suspension. The Wiltshire court also held that a jury trial was not required for second-offense DWI. The court stated the additional penalty for second-offense DWI is a 1-year license suspension, which does not approach the severity of the additional penalty for a third-offense DWI. The court concluded that "a jury trial is required for DWI cases only when the charge is third offense or greater." *Id.* at 822, 491 N.W.2d at 327. In *Wiltshire*, the court noted the

statutory provision found at Neb. Rev. Stat. § 25-2705 (Reissue 1989), which provides that "[e]ither party to any case in county court, except criminal cases arising under city or village ordinance . . . may demand trial by jury." The *Wiltshire* court held that to the extent that § 25-2705 precludes a jury trial for third-offense driving under the influence, the statute is unconstitutional.

The defendants in this case assert that because they were charged with violating three city ordinances, they faced the risk of being incarcerated for 18 months. They argue that the aggregated penalties to which they were exposed require a trial by jury. They rely on *Codispoti v. Pennsylvania*, 418 U.S. 506, 94 S.Ct. 2687, 41 L. Ed. 2d 912 (1974), and *U.S. v. Coppins*, 953 F.2d 86 (4th Cir. 1991), as support for the proposition that because they could have been sentenced to 18 months of incarceration they were entitled to a jury trial. Defendants also claim that the factually similar case of *State v. Cozzens*, 241 Neb. 565, 490 N.W.2d 184 (1992), in which the defendants were denied a jury trial, is distinguishable because the defendants in that case were charged with violating only one city ordinance and therefore subject to a maximum of 6 months' incarceration, a fine of $500, or both.

The State argues generally that a jury trial is precluded in a criminal case arising under a city ordinance under § 25-2705; that none of the offenses charged is serious; that the judge's comments at sentencing show that the defendants were never at risk of a sentence greater that 6 months in jail; that none of the defendants received a sentence greater than 6 months in jail; and that, therefore, the defendants were not entitled to a jury trial. In support of its argument that the defendants were not at risk for incarceration greater than 6 months, the State refers to the following dialog in connection with the sentencing of a protester who is not a party to this appeal:

THE COURT: . . . Sentence you to 150 days and costs on each count; they [sic] to run concurrent. Wait a minute. On second thought, 50 days on each count because I'm afraid you may be — This was not under the statute. This was under the ordinance. Let's see — Yeah. You can imprison for up to six months, can't you?

[Counsel for the State]: Yeah. It's concurrent.

THE COURT: Yeah. It's concurrent. Okay. Total, 150 days.

[DEFENDANT]: That's 50 on each?

THE COURT: No. 150 on each, each to run concurrent. Total - 150.

We have reviewed state and federal literature regarding the right to a jury trial in connection with multiple charged petty crimes where the penalty for each is a period of incarceration of 6 months or less. In circumstances where there are multiple petty offenses charged, the aggregated penalties for which could exceed 6 months' incarceration, there is a split of authority as to whether or not a jury trial is required. See, generally, *U.S. v. Bencheck*, 926 F.2d 1512 (10th Cir. 1991) (holding that although five petty offenses were charged, no jury was required where trial judge promised not to sentence the defendant to more than 6 months' imprisonment if found guilty). See, also, *U.S. v. Kozel*, 908 F.2d 205 (7th Cir. 1990), *cert. denied* 498 U.S. 1089, 111 S. Ct. 969, 112 L. Ed. 2d 1055 (1991) (holding that right to jury trial depends upon sentence actually imposed); *U.S. v. Garner*, 874 F.2d 1510 (11th Cir. 1989) (Holding no jury trial required for first-offense driving under the influence); *U.S. v. Musser*, 873 F.2d 1513 (D.C. Cir. 1989), *cert. denied* 493 U.S. 983, 110 S.Ct. 518, 107 L. Ed 2d 519 (holding no jury trial required for nonserious offense of having unattended sign in park across the street from the White House); *Bruce v. State*, 126 Ariz. 271, 614 P.2d 813 (1980) (holding that constitutional

right to jury trial for "petty offenses" depends upon the term of imprisonment actually imposed). Compare *U.S. v. Coppins*, 953 F.2d 86 (4th Cir. 1991) (holding jury trial required where defendant charged with multiple petty crimes arising out of same occurrence), with *Richter v. Fairbanks*, 903 F.2d 1202 (8th Cir. 1990) (holding jury trial required for third-offense driving under the influence where penalty was 6 months incarceration and 15-year license suspension), and *State v. Sanchez*, 109 N.M. 428, 786 P.2d 42 (1990) (holding that in determining whether or not a jury trial is required, court should consider objective measure of combined maximum statutory penalties rather than subjective measure of actual penalty threatened at time trial commences.) We have reviewed *Codispoti v. Pennsylvania*, 418 U.S. 506, 94 S. Ct. 2687, 41 L. Ed. 2d 912 (1974), on which the defendants rely, and find that its holding requiring a jury trial where multiple criminal contempt charges were tried together is distinguishable because, inter alia, each criminal contempt charge carried a potential penalty of greater than 6 months' incarceration.

[6,7] Following our review of the case law, it is clear that by judicial interpretation, a jury trial is not required in criminal cases involving "petty" offenses, but is required in criminal cases involving "serious" offenses. *Blanton v. North Law Vegas*, 489 U.S. 538, 109 S. Ct. 1289, 103 L. Ed. 2d 550 (1989); *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968). One guideline for determining if an offense is petty or serious is found in *Baldwin v. New York*, 399 U.S. 66, 69, 90 S. Ct. 1886, 26 L. Ed. 2d 437 (1970), in which it was stated that "no offense can be deemed 'petty' . . . where imprisonment for more than six months is authorized." As to offenses for which authorized incarceration is less than 6 months, seriousness, and hence a right to jury trial, is to be ascertained by reference to "'objective indications of the seriousness with which society regards the offense.'" *Blanton v. North Las Vegas*, 489 U.S. at 541 (quoting *Frank v. United States*, 395

U.S. 147, 89 S. Ct. 1503, 23 L. Ed. 2d 162 (1969). Under *Blanton*, the prime indicator of society's judgment about the seriousness of an offense is the maximum penalty authorized by a legislature.

[8,9] In the instant case, the offenses separately considered are all punishable by imprisonment of less than 6 months and $500 and are, therefore, "petty." There is nothing in the sentencing structure, such as additional penalties, which converts any of the offenses viewed separately into a "serious" offense. Cf. *State v. Wiltshire*, 241 Neb. 817, 491 N.W.2d 324 (1992). Thus, trying petty offenses together as a procedural device does not alter or elevate the seriousness of any of the crimes charged. Under *Blanton*, the appropriate constitutional inquiry is an examination of the individual offenses charged, not a review of their accumulated penalties. In the instant case, elements of the multiple crimes charged appear to permit their separate prosecution without offending double jeopardy protection. We note that the three crimes were charged in three separate charging documents as to each defendant. At oral argument, counsel for the defendants stated that each offense could have been tried separately, although all the charges stemmed from events occurring on December 14, 1991. The fact that the three crimes were tried together does not elevate the seriousness of any one of the offenses.

We note that several cases have held that where the defendant did not actually receive a sentence greater than 6 months, although the possibility for a sentence greater than 6 months existed, the defendant was not entitled to a jury trial. See, e.g., *U.S. v. Kozel, supra*; *Bruce v. State, supra.* We find the reasoning in the foregoing cases to be comparable to Nebraska jurisprudence in cases which analyze a defendant's right to counsel. See, e.g., *State v. Austin*, 219 Neb. 420, 363 N.W. 2d 397 (1985) (holding that although criminal defendants are generally entitled to appointment of counsel, in criminal case where defendant was

not actually imprisoned for any period of time, he was not entitled to appointment of counsel). Thus, in the instant case, it may be posited that defendants in criminal matters are generally entitled to jury trials except where the sentence actually imposed is not greater than 6 months.

Given the legislative sentence authorized for each offense, we conclude that the three crimes separately charged in the instant case are petty and tried separately or together do not require a jury. The implication of § 25-2705 is that the offenses at issue here are not viewed as serious, and a jury is not required in the prosecution of the violations of the municipal ordinances allegedly violated. We further note that there is case law, referred to above, concluding that where a defendant did not actually receive a sentence of incarceration greater than 6 months, a jury trial was not required. The trial court did not err in denying the defendants' requests for a jury trial.

DEFENSE OF JUSTIFICATION

The defendants asserts that the trial court erred in refusing to allow them to assert the defense of justification as expressed in Neb. Rev. Stat. § 28-1407 (Reissue 1989). The Supreme Court determined in *State v. Cozzens*, 241 Neb. 565, 490 N.W. 2d 184 (1992), that the defense of justification was not available to defendants under circumstances similar to the circumstances in this case. The assigned error is without merit.

SUFFICIENCY OF THE EVIDENCE

The defendants finally assert that the trial court erred in finding that the evidence was sufficient to sustain a conviction for violating the "Request to leave" and "Obstructing Administration of Law" ordinances.

The "Request to leave" ordinance, § 20-155, provides: "It shall be unlawful for any person to fail or refuse to leave the property of another person after being notified to do so by the

owner, occupant or person in control thereof, or by his agent." It is undisputed in the record that the defendants were notified by the representative of the medical center and by the police to leave. They did not leave; therefore they violated the ordinance.

The defendants assert that their mere election not to walk to the bus is insufficient to show that they intended to interfere with the officers' duty to arrest them. We are not persuaded by this argument. The "Obstructing Administration of Law" ordinance, § 20-21, provides: "It shall be unlawful for any person to purposefully or knowingly do any act, refuse to do any act, or to commit an act of omission with the intent to obstruct or interfere with any law enforcement officer or firefighter performing an official duty."

It is undisputed in the record that after the defendants were arrested, they each had to be carried to the bus. The defendants assert that during this process they were peaceful and polite, and we must infer that in order to conduct themselves in this manner, they were conscious. The record shows that they chose to have the officers carry them to the bus after their arrest. It is not reasonable to infer that this choice was made in order to assist the officers, rather than to "obstruct" or "interfere" with the officers "performing an official duty." The evidence is sufficient to support the convictions, and the judgments of the district court affirming those portions of the county court's judgments are affirmed.

AFFIRMED

IRWIN, Judge, dissenting.

This case involves the right to a jury trial when a citizen is charged with multiple, although admittedly petty, offenses arising out of the same act, transaction, or occurrence. Neither the U.S. or the Nebraska Supreme Court has resolved the scope of the right to a jury trial under these circumstances. *United States v. Potvin*, 481 F.2d 380 (10th Cir. 1973), dealt with this issue of whether an individual is entitled to a trial by jury when the potential aggregate penalty on several "petty" offenses is in excess of 6 months' imprisonment. Particularly on point is the following language from *Potvin*, 481 F.2d at 382-83:

> We believe that the defendants can view as no less serious a possible penalty of a year in prison when charged with two offenses arising out of the same act, transaction, or occurrence, than if charged with one offense having a potential penalty of one year's imprisonment. Nor, in our view, should the court view the offenses any less seriously. Mr. Justice White, in the opinion in *Baldwin v. New York*, 399 U.S. 66, 73, 90 S.Ct. 1886, 1890, 26 L.Ed.2d 437, said:
>
> "... Where the accused cannot possibly face more than six months' imprisonment, we have held that these disadvantages [the lack of the right to trial by jury], onerous though they may be, may be outweighed by the benefits that results from speedy and inexpensive nonjury adjudications. We cannot, however, conclude that these administrative conveniences, ... can similarly justify denying an accused the important right to trial by jury where the possible penalty exceeds six months' imprisonment ...."

I agree.

Three schools of thought have evolved in various courts' attempts to fashion a rule of law dealing with cases where multiple petty offenses are charged. See *People v. DiLorenzo*, 153 Misc. 2d 1021, 585 N.Y.S.2d 670 (1992).

The first subscribes to the "penalty-oriented" approach, which is based on the notion that the right to a jury trial depends not just on a legislative determination that offenses are "petty," but also requires adding together the maximum authorized sentences of each petty offense. Therefore, according to this approach, when multiple "petty" crimes expose a citizen to an aggregate sentence exceeding 6 months' imprisonment, a jury trial is required.

The second approach requires a jury trial when the sentence actually imposed is more than 6 months' imprisonment.

Third is a minority of courts which hold that whether a jury trial is required is determined by the punishment authorized by law for each individual offense. Consolidation of multiple petty offenses does not impact this approach, nor does the fact that consecutive terms of incarceration when aggregated exceed 6 months. *Id.*

Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968), does not answer our inquiry, since it examined the question of a citizen's constitutional right to a jury trial when a person is charged with a *single* offense.

Insight into this dilemma of determining whether a jury is required when an individual is charged with multiple petty offenses is provided in a discussion of *Potvin* contained in *Haar v. Hanrahan*, 708 F.2d 1547, 1551 (10th Cir. 1983):

> *Potvin* implicitly recognizes that modern criminal codes contain proscriptions that are far more complex, detailed, and extensive than the criminal law that existed at the time of the adoption of the Constitution. *See Duncan*, 391 U.S. at 188, 88 S.Ct. at 1469 (Harlan, J., dissenting). In particular, it recognizes that, because modern criminal codes permit multiple charges to flow from a single discrete act of criminality, a criminal prosecution can threaten a defendant with the consequences of a serious offense, even

> though the defendant is not charged with an offense deemed serious under *Duncan* or *Baldwin*. Thus, strictly applying the serious offense definition may not protect the defendant from an oppressive prosecution. *Potvin* addresses this problem by identifying the "act, transaction or occurrence" that underlies the criminal charges. In determining the right to a jury trial, it looks to the aggregate penalty that could result from the various charges arising out of a discrete criminal transaction.

The 10th Circuit Court of Appeals is not alone in holding that a citizen is entitled to a jury trial for multiple petty offenses arising out of the same act, transaction, or occurrence if threatened at the commencement of trial with an aggregate potential penalty of greater that 6 months' imprisonment. Other jurisdictions so holding include *U.S. v. Coppins*, 953 F.2d 86 (4th Cir. 1991); *U.S. v. Musgrave*, 695 F. Supp. 231 (W.D. Va. 1988); *U.S. v. Coleman*, 664 F. Supp. 548 (D.D.C. 1985); *State v. Owens*, 54 N.J. 153, 254 A.2d 97 (1969), *cert. denied* 396 U.S. 1021, 90 S. Ct. 593, 24 L. Ed. 2d 514 (1970). See *State ex rel. Barth v. Burke*, 24 Wis. 2d 82, 128 N.W.2d 422 (1964). As a sidenote, other jurisdictions have resolved this problem by legislating that whenever two or more crimes would result in a potential maximum aggregate penalty of greater than 6 months, a jury trial is required. See, La. Code Crim. Proc. Ann. art. 493.1 (West 1991); *Vallejos v. Barnhart*, 102 N.M. 438, 697 P.2d 121 (1985) (interpreting N.M. Stat. Ann. § 34-8A-5(B) (Michie 1981) to require aggregation of all potential penalties).

To hold that the requirement of a jury trial is determined by looking at each separate petty offense's authorized maximum penalty and to hold that charging a person with multiple petty offenses does not impact the right to trial by a jury does not recognize that modern criminal codes, including Nebraska's, allow several charges to be filed concerning a single criminal act and threaten a citizen with the consequences of a serious

offense, even though the person is not charged with an offense deemed serious under *Duncan*. Additionally, this approach may result in an *actual* sentence exceeding 6 months, when consecutive terms of incarceration are imposed.

Therefore, I conclude that a person charged with two or more petty offenses arising out of the same act, transaction, or occurrence is entitled to a trial by jury when the potential aggregate penalty on all counts is in excess of 6 months' imprisonment.

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December 29, 1994

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IN CASE OF: A-93-1128, State v. Kenneth Goering

Pet Appellant for Further Review & Brf **filed** 11/23/94 **has been reviewed by the court and the following order entered:** Petition for further review overruled.

Respectfully,

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COURT OF APPEALS

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IN CASE OF: A-93-1129, State v. Ann M. Bowen

Pet Appellant for Further Review & Brf **filed** 11/23/94 **has been reviewed by the court and the following order entered:** Petition for further review overruled.

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IN CASE OF: A-93-1130, State v. Lisa K. Strimple-Padios

Pet Appellant for Further Review & Brf **filed** 11/23/94 **has been reviewed by the court and the following order entered:** Petition for further review overruled.

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IN CASE OF: A-93-1133, State v. Emilie J. Volquartsen

Pet Appellant for Further Review & Brf **filed** 11/23/94 **has been reviewed by the court and the following order entered:** Petition for further review overruled.

Respectfully,

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